In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-172

DON BURGESS CONSTRUCTION CORPORATION dba BURGESS CONSTRUCTION and DONALD BURGESS and VERNON HENDRIX dba V&B BUILDERS,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and SEQUOIA DISTRICT COUNCIL OF CARPENTERS,
Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

COUNTER-STATEMENT OF THE CASE

The National Labor Relations Board, with concurrence of the Court of Appeals found that Don Burgess Construction Corporation and V&B Builders were a single employer as that doctrine has been explained in numerous Board and Court decisions. (A-10-15 and C-2). Petitioners do not suggest to this Court that that finding should be over-

turned. Indeed, in light of all of the facts, they cannot reasonably attack that finding.

From the finding that these employers were a single employer, the Board's order, enforced by the Court of Appeals, necessarily follows.

II

THERE IS NO REASON TO GRANT THE PETITION FOR WRIT OF CERTIORARI

Each of the four reasons for asserting that the Petition should be granted will be discussed in turn. None of the reasons advanced by the petitioners is substantial in any regard.

A. The Board Properly Ordered the Single Employer to Abide By the Collective Bargaining Agreement

Having found that Burgess Construction and V&B Builders were a single employer, it necessarily follows that both should be ordered to abide by the collective bargaining agreement executed by Don Burgess on behalf of V&B Builders on August 6, 1974. (A-3).

That an employer may be compelled to sign and abide by a collective bargaining agreement was established by this court in *NLRB v. Strong Roofing & Insulation Co.*, 393 U.S. 357 (1969), a principle which has subsequently been followed under numerous circumstances. See *NLRB v. A&H Specialties Co.*, 407 F.2d 820 (6th Cir. 1969); *NLRB v. Raven Industries, Inc.*, 508 F.2d 1289 (8th Cir., 1974); *Southland Dodge*, 205 NLRB 276, enforced, 492 F.2d 1238 (3rd Cir. 1974).

This Court has recognized the "broad discretion to fashion and issue [a remedy] as relief adequate to achieve the end, and effectuate the policies, of the Act." *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 176 (1973). The sole case relied upon by the petitioners is irrelevant for it dealt with circumstances where the Court had imposed the terms of a contract on an employer where there had never been any agreement reached through any negotiations.

It was therefore particularly appropriate to order the single employer to be bound to the collective bargaining agreement executed by Don Burgess on behalf of V&B Builders.

B. The Doctrine of Fraudulent Concealment Is Applicable To the Statute of Limitations Contained in the Act

In their Petition, the Petitioners do not contest the finding of the Board, affirmed by the Court of Appeals, that there was fraudulent concealment from the union of the unfair labor practices involved. They however insist that the doctrine of fraudulent concealment cannot be applied to the six-month statute of limitations contained in 29 USC 160(b).

Petitioners have not offered any reason why this doctrine should not apply to the provisions of the National Labor Relations Act, as this Court has applied it to other statutory provisions. See *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). See also *NLRB v. Allied Products Corp.*, 548 F.2d 644, 650 (6th Cir. 1977) and *Int'l Ladies Garment Workers Union v. NLRB*, 463 F.2d 907, 922 (D.C. Cir. 1972).

There is no compelling reason for this Court to consider that the doctrine of fraudulent concealment is contrary to a reasonable application. 29 USC § 160(b).

C. A Single Employer Doctrine Was Applicable Since the Employer Has Constituted An Appropriate Unit

In this case, the Board found that the carpentry employees of V&B Builders and Don Burgess Construction "together constitutes a single unit for collective bargaining purposes." (C-2). This finding was reaffirmed by the Court of Appeals. (A-15-18).

Petitioners argue that the Board has declined to find that an appropriate bargaining unit issue in some cases. See, *Peter Kiewit Sons' Co.*, 231 NLRB 76 (1977). Petitioners do not however argue that the facts of this case are precisely the facts of that case in which the Board declined to find an appropriate bargaining unit.

Since Petitioners have failed to demonstrate that the Board's finding that the carpentry employees are an appropriate unit was an abuse of discretion, that decision must stand. For, as this Court has pointed out, such a decision regarding bargaining unit "is rarely to be disturbed." *Packard Motor Car v. NLRB*, 330 U.S. 485, 491 (1947).

D. The Board Properly Exercised Its Discretion In Denying the Petitioner's Motion To Reopen the Record

The Court of Appeals below agreed that "the respondents failed to meet their burden" in demonstration why the record should be reopened. (A-22).

This motion filed long *after* the Administrative Law Judge had issued his decision was properly denied since such decisions rest with the Board's sound discretion. *NLRB v. Yale Manufacturing Co.*, 356 F.2d 69, 71 (1st Cir. 1966); *NLRB v. Seafarers Int'l Union*, 496 F.2d 1363, 1365 and *NLRB v. West Coast Casket Co.*, 469 F.2d 871, 873 (9th Cir. 1972).

It is not necessary to comment upon the statements made in the affidavits filed in support of the motion. The statements were marginally relevant to the issues except that of credibility. However, "newly-discovered evidence, the effect of which is merely to discredit, contradict or impeach a witness does not afford a basis for granting of a new trial." *NLRB v. Sunrise Lumber & Trim Corp.*, 241 F.2d 620, 625-26 (2nd Cir. 1957), cert. denied, 355 U.S. 818 (1957).

CONCLUSION

The peitioners have not advanced any substantial reason compelling the granting of their petition, and it should therefore be denied.

Dated: August 13, 1979

Respectfully submitted,

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